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Supreme Court, U.S.
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No. 09-148

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In The
Supreme Court of the United States

MSEJ, L.L.C.,

Petitioner,

vs.

TRANSIT CASUALTY COMPANY IN RECEIVERSHIP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state court, in an equity receivership consistent with the Fourteenth Amendment and the rights of due process and access to the courts, refuse evidence in support of the claim of an insured against an insolvent insurer on the basis of a rule which demands that all "evidence of claims" be submitted on short notice, and denies the insured the opportunity to present evidence to rebut the Receiver's denial of his claim?

2. May a state court, consistent with Fourteenth Amendment standards of due process and the right of petition, deny an insured's claim on the assets of an insurer in receivership by virtue of a determination of a referee which is not substantively reviewed by any duly constituted court?

3. Where applicable state statutes allow claimants to submit newly developed evidence in certain circumstances, may the Supreme Court of a state determine, consistent with rights of procedural due process, that such statutes are "trumped" by a locally adopted rule?

RULE 29 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that it is a limited liability corporation incorporated under the laws of the State of Delaware, that it has no parent company, and that no publicly held corporation owns any part of Petitioner's stock.

Pursuant to Supreme Court Rule 29.4(c), Petitioner states that the constitutionality of a statute of the State of Missouri, being R.S. Mo. § 375.670, as applied by the Supreme Court of Missouri, is drawn into question in this proceeding, and 28 U.S.C. § 2403(b) may apply. A copy of this document will be served on the Attorney General of the State of Missouri.

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OPINIONS BELOW

The opinion of the Missouri Supreme Court (App., infra, 1-9) is reported at 280 S.W.2d 621. The opinion of the Missouri Court of Appeals for the Western District (App. 10-26) is reported at 2008 Mo. App. LEXIS 902. The Referee's Findings of Fact, Conclusions of Law, and Recommendations (App. 27-71) are unreported.

JURISDICTION

The judgment of the Missouri Supreme Court was entered on March 31, 2009. A timely motion for rehearing was denied on May 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " U.S. CONST. AMENDMENT XIV.

The statutes of the state of Missouri provide, in relevant part, as follows:

375.670. 1. The court, upon the application of the receiver, shall establish claims procedures and shall limit and may extend the time for the presentation of claims against the receivership, . . . and any creditor neglecting to present his claim within the time so limited shall be debarred of all right to share in the assets of the insurer.

375.1214. 1. When a claim is denied in whole or in part by the liquidator, written notice of the determination shall be given to the claimant or his attorney by first class mail at the address shown in the proof of claim. Within sixty days from the mailing of the notice, the claimant may file his objections with the liquidator. If no such filing is made the claimant may not further object to the determination.

2. Whenever objections are filed with the liquidator and the liquidator does not alter his denial of the claim as a result of the objections, the liquidator shall ask the court for a hearing as soon as practicable. . . . The matter may be heard by the court or by a court-appointed referee. . . . The referee shall submit written findings of fact and conclusions of law along with his recommendation for disposition which shall become final if a motion for reconsideration before the court is not filed by the liquidator or claimant with the court. . . . The motion for reconsideration shall allege either the existence of new facts which could not, with reasonable diligence, have been discovered and presented before

> the referee, or such erroneous conclusions of law, that would justify reconsideration of the claim by the court. . . . A motion for reconsideration not ruled upon by the court within ninety days after the motion is filed shall be deemed denied for purposes of appeal.

R.S. Mo. § 375.670; 375.1214.

STATEMENT OF THE CASE

This case raises important and recurring questions concerning the authority of equity receivers appointed by state courts, and especially receivers appointed as statutory receivers of insurance companies, to dispose of the rights of claimants in those receiverships through *ad hoc* procedures which disregard due process of law.

After proceedings had been pending for over fifteen years, the court supervising the receivership of Respondent, the insolvent Transit Casualty Company, ordered that all claimants holding so-called "policyholder protection" claims against Transit should submit all evidence concerning those claims so that they could be finally determined. The deadline for doing so was approximately ten weeks after the Order was published and served, and the Order declared that no information submitted after that date would be considered by the Receiver. Petitioner, presenting the insurance claims of the Johns

Manville Corporation was unable to fully document the more than 600,000 claims of individuals asserting injury caused by Manville's asbestos products, that had accumulated against Manville in the fourteen years since Manville had originally submitted claims to the Transit receivership in 1987, in the time allowed. As a result, its claims for at least $24 million in insurance coverage were rejected by the Transit Receiver and its Receivership Court. Petitioner then sought recourse to a statutory provision allowing "reconsideration" of its claims when new evidence, which could not have been submitted to the Referee, was available. The Receivership Court did not rule on its motion, and under the governing statute the Referee's decision was "deemed" to have been upheld although neither the circuit judge or any other judge reviewed it. The Missouri Supreme Court, reversing its Court of Appeals, held that the statutory right to reconsideration had been "trumped" by the circuit court's case-specific rules.

Procedures, such as these, which accord substantially unreviewable discretion to receivers and referees in the determination of claims against insolvent insurers are not uncommon in state insurance insolvency practice, as are mechanisms that deny unsatisfied claimants direct access to the Receivership Court. Their effect is to deprive insurance policyholders of their important rights to share in the insolvent estates of their insurer, without due process of law. The Court should grant

certiorari in order to vindicate the Fourteenth Amendment rights of claimants like Manville to, effective, and meaningful access to neutral tribunals for the determination of their rights.

Transit Casualty's Receivership and Johns Manville's Bankruptcy

The failure of Transit Casualty Insurance Company is thought to be the largest single insurance failure in US history, and to rank as second in the world. Its demise in 1984 was the subject of a Congressional investigation and report. Transit specialized in commercial insurance, often in very large denominations. Its policyholders included thousands of businesses, including many whose names are household words. Among them was the Johns Manville Company, which it insured for several years against general liability, product liability, and employer liability.

Manville's troubles need no introduction to this court. It had a great deal of insurance, but not, as it turned out, enough to meet its massive liabilities. Had Transit remained solvent, Transit would certainly have been called upon to pay the limits of its policies in full. Instead, Transit and Manville both became insolvent. Manville's bankruptcy was eventually resolved by the creation of trusts for the benefit of those injured by its products, payments to whom were to be funded by, among other things, the proceeds of its insurance policies.

Transit, meanwhile, was placed in receivership in the state courts of Missouri, and an order issued requiring all persons having claims against it to file them with its Receiver. Recognizing that the commercial policies Transit wrote covered claims which might not materialize for many years after the policies themselves expired, the Receiver permitted claimants to file "policyholder protection" claims: a sort of placeholder claim which asserted that the policyholder believed claims, within the coverage of the policy, might develop in the future. It was anticipated that, as the receivership matured, owners of these placeholder claims would be given an opportunity to finalize their claim submissions in time to participate in the insurer's final dividend payments.

In 1987, Manville's trustees also filed claims for losses that already threatened it, accompanied by voluminous documentation – 300 boxes worth – of the number and characteristics of the claims that had been made against it. The Receiver's staff reviewed that material and concluded, without bothering to address individual claimants, that Manville's aggregate liability would greatly exceed the limits of the Transit policies. In 1995, they therefore notified the trustees that they had allowed its claims for approximately $24 million, but they left open the possibility that further claims could be allowed in the future. That announcement was not accompanied by payment, nor was any to be expected soon. The trustees filed the notice away and turned their attention to more immediately remunerative work.

Transit and Manville Seek To Wind Down

By 1998, the Manville trustees concluded that they had collected and distributed just about all of the money available to them, and sought to realize in bulk on the odds and ends left in their asset inventory. Petitioner purchased Manville's remaining insurance receivables, most owed by insurers which, like Transit, were themselves insolvent.

In 2001, Transit's Receivership Court, believing that the Receiver, too, had realized most of the assets they could expect to collect, sought to finally resolve all creditor claims. It issued Order 49, a call for all holders of policyholder protection claims to submit up to date evidence of not only claims incurred to date, but also claims estimated to be incurred in the future. After fourteen years of silence, the deadline for submitting this material was only about 75 days after its publication of the Order and its mailing to Petitioner.

Reviewing Manville's records to respond to Order 49, Petitioner realized that both Manville's trustees and the Transit Receiver had been reading the Manville insurance policy wrong. It did not, as they had assumed, provide policy limits of $24 million. It provided limits of $24 million *each* for product liability and employment liability claims – and Manville had plenty of each variety. They hastily submitted a demand for the extra $24 million,

together with all of the evidentiary support they could cobble together in the time allowed.[1]

The Receiver promptly rejected the claim, although it was not until 2005 that his final statement of reasons was issued. There followed a convoluted and lengthy effort by the Receiver to justify its position.

In the course of the proceedings, Petitioner obtained two key blocks of information. First, it discovered that the Manville trustee, before it had assigned its rights to Petitioner, had submitted hundreds of boxes of information about asbestos claims accruing before 1990 to the Receiver, that the Receiver's staff had already carefully reviewed it, and that they had concluded it easily supported a multi-million dollar claim. Later, Petitioner obtained, from the custodians of the Manville trusts, a quantity of specific claim information about over 600,000 claims which had been asserted against the Manville bankrupt estate which Petitioner had not previously been able to provide.

Between 2001 and 2005, Petitioner and the Receiver exchanged arguments and insights. The Receiver filed, and abandoned, various intervening motions, and withdrew and reissued the Petitioner Notice of Determination of its claim. It even took a

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[1] Much later, an expert retained by Petitioner pointed out that the policy probably offered yet another $24 million for general liability claims.

detour to the bankruptcy court which had originally ordained the sale of the insurance receivables to Petitioner. Numerous motions filed and argued by Petitioner and the Receiver went undecided by the referee and the Receivership Court.

In 2005, the Receiver finally submitted the disallowance of Petitioner's claim to a referee. The referee sustained the disallowance, concluding among other things that the information Petitioner developed after March 15, 2001 must be ignored. Petitioner sought reconsideration pursuant to R.S. Mo. § 370.1214, and sought to submit the disregarded evidence. The Receivership Court did not act on its motion, and, as Missouri's statutes provide, the motion was deemed denied.

Petitioner appealed to the Missouri Court of Appeals, which rejected the referee's conclusions. It reversed the referee's decision and, among other holdings, directed the court below to consider Petitioner's additional evidence. But the Receiver sought further review in the Missouri Supreme Court, and the Supreme Court reinstated the decision below. Petitioner's motion for reconsideration was rejected.

The Missouri Supreme Court's reversal of the Court of Appeals turned on a single holding: that Section 370.1214 could be, and was, "trumped" by the local rules and orders – issued by the Receivership Court (the "Transit Rules"). Petitioner, it concluded, had not initially submitted sufficient evidence to

support its new claims, and the additional evidence it submitted could not be considered. In short, the Supreme Court ruled, "the curtain had fallen" on Petitioner's claim. But in fact, Petitioner's claim was never allowed on the stage.

Raising Federal Questions

Petitioner's concerns that the Transit Rules and the administrative order, combined with the "deemer" provisions governing review of the Referee's decisions, deprived it of access to the court and a fair hearing were expressed at every appropriate juncture. Throughout the six years between its claim submission in 2001 and the Referee's decision in 2007, it consistently objected both to its inability to present its claims to the circuit court, and to the unfair result it would suffer if it were limited to the small amount of evidence it had been able to assemble in the first few months of 2001. The Receiver appeared to implicitly accept those arguments, since both he and Petitioner retained experts and conducted depositions inquiring into the sufficiency of the additional claims information which Petitioner had located, not only in Manville's files, but in the Receiver's files as well. The Referee, however, rejected Petitioner's concern about the prohibition on its submission of evidence to the hearing, holding that the prohibition was "a valid use of the police power." App. 60-61. Before the Court of Appeals, Petitioner argued both the impropriety of the "deemer" approach and its right to submit "new evidence" under R.S. Mo. § 370-1214.2. In opposition, the Receiver argued that, "[Application of Order 49] is

neither forbidden by the statutory provisions of the liquidation code nor is it violative of due process, but rather it is a valid exercise of the state's police power." Appellee's Brief in the Court of Appeals at 34. The Court of Appeals accepted Petitioner's argument that the statute permitted it to submit new evidence, and directed the circuit court to hold hearings to properly determine the validity of Manville's claim. This ruling made it unnecessary for the Court to directly address the due process arguments. On the Receiver's motion the Supreme Court accepted transfer of the matter from the Court of Appeals. Petitioner relied on the brief submitted to the Court of Appeals. The Receiver's brief resembled its previous one, including the argument that the application of Order 49 "was not violative of due process and was a valid exercise of the state's police power." Respondent's Substitute Brief in the Supreme Court at 38. The Missouri Supreme Court did not, in terms, respond to the due process and police power arguments raised by the parties, but held that the Administrative Order was a proper exercise of authority granted by R.S. Mo. § 375.670, which "trumped" the procedures set out in § 1214 of the same chapter.

Reasons to Grant the Writ

The Contracts Clause of the Constitution has never been considered an obstacle to state receivership proceedings, even though superficially they seem to interfere rather directly with the obligation of contracts. An insolvent cannot pay what it does not

have. Receivership does not impair contracts. It merely allocates the company's insufficient assets among its acknowledged creditors as fairly as practicable under the circumstances. Yet there can be no doubt that the right of a creditor to share fairly in those assets is a valuable property right which the government may not destroy except in the exercise of due process of law.

For most businesses, the Bankruptcy Code sets out the boundaries of that due process. A small, but important, class of debtors is barred from bankruptcy proceedings, generally because their affairs are considered either so specialized, or so much matters of public concern, that they must be administered under the supervision of regulators. They include banks, securities firms and similar financial institutions, insurance companies, and pension funds. Lacking the benefit of fully developed jurisprudence and specialist courts, such proceedings may degenerate into chaos, or worse, turn the public whose interests they were supposed to protect into unwitting victims. Such was the case in the matter of Transit Casualty Insurance Company.

I.

Ad hoc receiverships in state courts are prone to dangerous procedural shortcuts, which some state courts have been unable or unwilling to prevent.

Insurance receiverships often resort to summary procedures to keep administrative costs from depleting

the already inadequate pool of estate assets. With care and attention, it is possible to balance due process with economy, and professional insurance receivers have become adept at doing so. But receiverships vary greatly in effectiveness, and notable violations of fundamental protections continue to occur.

This Court has not addressed the application of rules of access to courts or due process to the rights of creditors in equity receiverships since the 1930's. A startling degree of irregularity has developed in the degree to which fundamental rights of participants in those proceedings are honored.

In the case of the receivership of Transit Casualty Company, the circuit court adopted a set of protocols known as the "Transit Rules." For the most part, these were benign regulations meant to integrate the insurance receivership, which involves thousands of separate claims in a single proceeding, with a court system more accustomed to dealing with parties two by two. But the effort to keep all of those claims from swamping the court produced some curious compromises, whose danger to due process should have been obvious. Startling features of those rules included these:

- The Receiver had the keys to the courthouse. Claimants to whom Transit owed money had no right to bring their claims before the court. Only the Receiver could present disputed claims to the court for resolution, and no

timetable existed within which he should do so.

- The circuit court appointed a Referee to hear all, or most, disputed claims, and the court itself took little part in their resolution. But pursuant to Missouri statute, § 375.1214 those recommendations become "final," without the necessity of any action by the circuit court, unless the claimant seeks "reconsideration."

- Disappointed claimants may seek "reconsideration" of the Referee's ruling, if they can show "new facts" which could not have been presented to the Referee, but that motion is "deemed" denied if the circuit court does not act on it.

- The time allowed for claimants to respond to it was woefully inadequate. They were expected to supply seventeen years' worth of claim experience, plus "actuarial evidence of future claims" (which the Receiver would not have even accepted heretofore) on 10 weeks' notice. Nor was there any need for such haste. Seven years later, the Receiver is still wrestling with Transit's affairs, and he did not even bring Petitioner's claims to court for over four years after they were submitted.

Insurance receiverships, while relatively infrequent, nevertheless are carried out in state courts

around the country. Some of those proceedings, like Transit's, apply procedural rules of dubious quality. A common thread is the delegation to the Receiver of discretion to finally determine important creditor rights without serious judicial review.

For instance, the Transit Rules have been mimicked in another large insurance receivership, that of Frontier Insurance Company in New York, with the added fillip that the Rehabilitator of Frontier is authorized to make private settlements with claimants, while employing a stay to prohibit parties who do not accept the settlements from proceeding in court. *In the Matter of the Rehabilitation of Frontier Ins. Co. v. John P. et al.*, 57 A.D. 3d 1302, 870 N.Y.S.2d 144 (2008). In connection with another claim, the New York Appellate Division twice ordered the Frontier rehabilitation court to act on, and accord full faith and credit to, a claim which had been reduced to judgment in a federal court. *Matter of Callon Petroleum Co. v. Superintendent of Ins. of N.Y.*, 2008 N.Y. Slip Op. 6252 (N.Y. App. Div. 3d Dep't 2008). In spite of two reversals, the rehabilitation court has not yet acted, and the objectionable rules continue to be enforced.

In several jurisdictions, the statutory receiver is granted authority to determine the rights of policy-holders without hearing, with judicial review limited to an "arbitrary and capricious" standard, even though no forum, independent of the receiver, has heard the claim. *Garimendi v. Golden Eagle*, 128 Cal. App. 4th 452 (1995); *In re Executive Life Ins. Co.*,

32 Cal. App. 4th 344 (1995); *Angoff v. Holland-America Ins. Co. Trust*, 937 S.W.2d 213, 216 (Mo. Ct. App. 1996).

Similar "discretionary" power has been held to limit policyholder's rights to review of the decisions of insurance receivers in adopting "rehabilitation plans" which effectively rewrite the terms of insurance contracts, without meaningful input by creditors. *Minor v. Stephens*, 898 S.W.2d 71 (Ky. 1995). *Foster v. Mutual Fire, Marine and Inland Ins.*, 531 Pa. 598 (1992).

The sense of emergency and great complexity associated with the failure of a financial institution has sometimes led federal receivers astray as well, but their errors have generally been corrected by federal courts on appeal.

> In *SEC v. Elliott*, 953 F.2d 1560 (11th Cir. 1992), the Securities and Exchange Commission, as equity receiver for promoter of a Ponzi scheme, was required to sort out the interests of its victims. The Eleventh Circuit found that the "summary" procedures applied denied objecting claimants due process because they had no opportunity to submit evidence controverting the receiver's conclusions.
>
> In *SEC v. Hughes*, 461 F.2d 974 (2nd Cir. 1972), the Securities and Exchange Commission applied administrative procedures to determine that a broker-dealer was insolvent. A "literal reading" of § 5(b)(1) of

> the Securities Investor Protection Act of 1970 appeared to prohibit post-takeover challenge to that determination, but the 11th Circuit construed the statute to permit *de novo* review of the SEC's determination, thus avoiding a constitutional violation.
>
> A former version of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) permitted the foreclosure of bank creditors who had never received mailed notice of the deadlines for submitting their claims to the receiver, in a case where the RTC had actual knowledge of the complainant's address. The 4th Circuit cured the looming constitutional defect (since corrected by statute) in the statute by construing it to require mailing of notice to claimants whose particulars were known to the Receiver. *ELMCO Properties, Inc. v. Second National Federal Savings Association*, 94 F.3d 914 (4th Cir. 1996).

It cannot be argued that due process and protection of policyholders of insolvent insurers are incompatible. Courts in many other instances manage receiverships without disregarding the constitutional rights of their stakeholders. See, *Williams v. Wainscott*, 974 P.2d 975 (Alaska 1999); *In Re Commissioner of Banks and Real Estate*, 764 N.E.2d 66 (Ill. 2001); *People ex rel. Schacht v. Main*, 448 N.E.2d 950 (Ill. 1983); *Stewart v. Citizen's Casualty Co. of New York* 244 N.E.2d 690 (N.Y. 1968); *Ohio Director of Transp. of State v. Eastlake Land Dev. Co.*, 894 N.E.2d 1255 (Ohio 2008); *New York Stock*

Exchange v. Pickard & Co., Inc., 296 A.2d 143 (Del. 1972).

As these cases demonstrate, federal equity receivers, who like the state ones must operate outside the comfortable regimen of the bankruptcy courts, require the supervision of courts enforcing the strictures of the Constitution in a way that is consistent and fair. Under the Fourteenth Amendment, the state courts and administrative agencies owe citizens the same obligations of due process that are regularly vindicated in federal courts, but in fact those duties are too frequently ignored. This Court has clearly held that no "circumstance of war or the accusation of treasonous behavior" offsets the interest of individuals in procedural due process. *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004). While circumstances may affect what process is due, they cannot eliminate the right to due process. This Petition for Certiorari should be granted to allow this Court to remind those states inclined to forget that the same essential principles apply to them as well.

II.

The constitutional right of citizens to access the courts requires access that is adequate, effective, and meaningful.

The right of access to the courts has long been recognized by this Court as "one of the 'highest and most essential privileges of citizenship.'" *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142 (1907). But

it is not enough simply to promise "some form of hearing" before an individual is finally deprived of a property interest. That hearing must be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The existence of a supposed "emergency" is no valid ground for the permanent denial of access to a tribunal offering "a meaningful opportunity" to contest the case before a "neutral decisionmaker." *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004). Nor is "financial cost alone" of controlling weight. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

However well-intentioned, the Transit Rules, combined with the court's order directing the Receivership of Transit, effectively barred the courthouse door to Petitioner. After the adoption of Order 49, the hearing before the Referee was even further constrained. In addition to the brutal timetable provided for the claimants' response, a claimant was limited to the evidence submitted with its final proof, and could not adduce additional evidence needed to rebut factual or legal assertions of the Receiver.

The capstone of this mockery of due process is the permission, granted by the statute and fully exercised by the Receivership Court, to simply ignore the motions and appeals of dissatisfied claimants. While the statute allowed claimants to file such

objectives, it did not require the court to actually decide them.

The Missouri Supreme Court went even further: it held that a circuit court may, by adopting a "rule," override statutory protections and thus deny a litigant the right of access to judicial redress which the Missouri Legislature had granted. This is kangaroo court justice. As Justice Powell wrote in *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974), "While the legislature may elect not to confer a property interest . . . , it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

III.

Due process requires that a claimant be allowed to present evidence in support of his claim, to have it fairly considered by a neutral tribunal, and to have the benefit of statutory provisions created for his protection.

Recognizing that due process requires "some form of hearing" does not answer the question of what sort of hearing is due. "Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). Rather, consideration must be given to the significance of the private interests at stake, the risk that a given procedure will yield an erroneous answer, and the likelihood that another procedure would do better,

and finally, what the Government's interest in the process might be. *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

> [T]he Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee."

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985), *citing Arnett v. Kennedy*, 416 U.S. 134, 168-169 (1974).

The *Mathews* factors should have weighed heavily in favor of Petitioner's right to have presented its evidence. That it possesses a "private interest" in its rights as a creditor of the Transit estate can hardly be doubted. The protection of property rights is mandated in the Contracts Clause as well as the Fifth and Fourteenth Amendments. While the Government, in the form of the Transit Receiver, has an interest in prompt closure of the receivership, its more important and compelling interest is in the resolution of its affairs in a way that optimizes the value of the rights of all of its policyholders. To that extent, its interests are substantially aligned with those of Petitioner. While the Receiver properly seeks to balance cost-effectiveness and fairness in the resolution of claim disputes, he is not free to strike that balance wherever he sees fit. The Missouri

Legislature defined at least one of the balance points when it enacted Section 1214.

The remaining *Mathews* inquiry is whether the procedure the Circuit Court adopted creates a risk of an "erroneous" answer. That question can only be answered in the affirmative. Order 49 and the Transit Rules invited error for three reasons. Any rule that prohibits the introduction of relevant evidence increases the likelihood of error. That risk that must be balanced against the need for expedition and finality, but, as we have seen, in this case the Receiver had years, not weeks, to spare. No additional delay or confusion would have resulted from the admission of the evidence. The second invitation to error is that Order 49, at least as interpreted by the Missouri Supreme Court, prohibited the submission of evidence responsive to the facts alleged in the Receiver's Notice of Determination.

A third risk of error was created by the curious provision in the statute which granted a litigant a right to seek reconsideration of its claims, but permitted its motion to be "decided" by inaction. It is axiomatic that due process requires a "neutral and detached judge in the first instance," *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972). Most cases like *Ward* consider whether the judge is fair. In this case, there was no judge, fair or otherwise, present at all. It is impossible to reconcile the rules calling for neutral and detached judges with a procedure which permits the court to "decide" cases by taking the day off.

The *ad hoc* character of procedure under the Transit Rules and the unreasonable timetable of Order 49, combined with the Missouri Supreme Court's perversion of the otherwise curative protection of Section 1214, to deprive Petitioner of its right to present its claim to a share in the assets of the Transit estate, without due process of law.

CONCLUSION

The phenomenon of "give-up's" and "go-away's" is an unwelcome but familiar one to insurance company receivers. A whole class of insurers, like Transit, collapsed between 1984 and 1986 and are now in the final stages of receivership. Belying earlier dire predictions, some of them have been able to pay policyholder claims at 100%. Unfortunately, this is not so much a consequence of Receivers' skill in asset collection, as their success in discouraging claims. Policyholders who could economically justify litigation to prosecute a valid claim against a solvent insurer cannot afford the same litigation against an insurer who can promise only an uncertain recovery, twenty years late. Those not caught in this financial pinch point may yet be defeated by court procedures that seem designed to restore the insurer to an illusory sort of solvency by discouraging its legitimate creditors. Not many insureds have $25 million policies for incentive.

The owners of $10,000 policies are no less deprived of their property by process which is opaque and obstructive, but without Petitioner's resources, they are even less able to insist on due process of law. In 1938, this Court established the baseline rules for insurance receivership when it affirmed the dispositions of a California court in *Neblett v. Carpenter*, 305 U.S. 297 (1938). That decision still informs insurance receivership, but the issues are exponentially more complex, and the stakes exponentially higher. It is important that this Court revisit the procedure applied by Commissioner Carpenter's successors does not cause them to add insult to the injury caused to policyholders by their insurers' financial collapse.

Respectfully submitted,

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[SEAL]
SUPREME COURT OF MISSOURI
en banc

MSEJ, LLC, Appellant, v. Transit Casualty Company In Receivership, Respondent.	)	No. SC89663

APPEAL FROM THE CIRCUIT COURT
OF COLE COUNTY
The Honorable Richard G. Callahan, Judge

Introduction

(Filed Mar. 31, 2009)

This appeal tests the ability of the circuit court to enforce its deadline for submitting claims in the long-running Transit Casualty receivership. Ten years ago, MSEJ bought some claims that date back to the 1980s. It now asserts that the receivership statute allows it one more chance to present those claims before the final curtain falls.

The circuit court correctly held that the curtain has fallen.

History

Transit Casualty Company is an insurance company that was declared insolvent by the circuit

court on December 3, 1985. All of its policies were canceled, and it entered receivership under the supervision of the court and a "special deputy receiver" appointed to represent the director of the department of insurance, the nominal receiver. The receivership court set a "bar date" – that is, a deadline of December 31, 1987 – for the filing of claims against the company's receivership estate. The receiver was charged with handling outstanding claims and winding down the insolvent business. In 1986, pursuant to section 375.670.1[1], the receivership court issued an administrative order stating that the court would "from time to time issu[e] serially numbered Administrative Orders relative to administration, procedures, systems, goals and actions to be taken by the Receivership and those involved in the Receivership."[2]

In 1987, the receivership court issued Administrative Order 13, adopting Rule 75, which was to govern the procedure for bringing claims. Although the bar date was December 31, 1987, Rule 75.6(b) outlined a test for determining whether to allow a

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[1] All statutory references are to RSMo 2000 unless otherwise indicated.

[2] Section 375.670.1 states that "[t]he court, upon the application of the receiver, shall establish claims procedures and shall limit and may extend the time for the presentation of claims against the receivership, and notice thereof shall be given in such manner as said court shall direct; and any creditor neglecting to present his claim within the time so limited shall be debarred of all right to share in the assets of the insurer."

post-bar-date claim. The special deputy receiver was to consider whether "a. the claimant did not know of the Claim prior to the December 31, 1987 bar date; b. the claimant filed the Claim with the Receivership as promptly as reasonably possible upon learning of the Claim; c. the Claim is covered by the policy; and d. allowance of the Claimant's late-filed Claim will not prejudice the orderly administration of the liquidation of the Receivership." Claims filed after the bar date were allowed only if the special deputy receiver determined that they passed the test prescribed by Rule 75.6(b).[3]

The circuit court as receivership court issued Administrative Order 49, which established a final, once-and-for-all time limit on the filing of claims. Administrative Order 49 stated that "to expedite the closure of the Receivership . . . all claimants, including those that have already filed policyholder protection proof of claim forms, must file the existing evidence of their current unresolved claims . . . by 3/15/01. After that date no new claims or evidence of claims shall be accepted by the Special Deputy Receiver."

One of Transit's policy holders was the Johns-Manville Corporation, which purchased six umbrella liability policies. Manville timely filed proof of claims against Transit. A proof of claim is notice given to the

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[3] Rule 75 was amended several times by subsequent administrative orders.

receiver that the claim holder asserts that it is entitled to payment. In 1998, MSEJ purchased from Manville all of its outstanding claims against Transit at the time it entered receivership. Three years after MSEJ purchased Manville's interest in the receivership, MSEJ filed $19 million in additional claims. There was no additional proof submitted with these claims beyond a one-page letter stating MSEJ's position that it was entitled to payment of the new, unsupported claims. The proof of claim failed to include the names of policyholders or the dates or details of any alleged injuries incurred by the policyholders. MSEJ did not supply any of this information prior to March 15, 2001, the date specified as the claim termination deadline in Administrative Order 49.

The special deputy receiver determined that there was insufficient evidence to support the March 2001 claim. In May 2001, the receiver mailed its notice of determination to MSEJ. MSEJ filed a request for review the next month. Section 375.1214 provides for appeal from denials of claims by a receiver. The matter is appealed to a referee, who makes findings of fact and conclusions of law and enters a recommendation concerning the claim. *Id.* Here, MSEJ filed for appeal to the referee. On September 7, 2005, MSEJ attempted to submit supplemental evidence to the referee, who refused to consider the evidence not previously submitted to the special deputy receiver. The referee determined that the March 2001 cutoff barred consideration of

supplemental evidence and upheld the receiver's denial of the March 1, 2001 claim. Further, the referee determined that MSEJ "should be estopped from making any further claims" because MSEJ and its assignor Manville previously had told the receiver that it would be making no further claims against the Transit estate. MSEJ moved for reconsideration in the circuit court pursuant to section 375.1214.2. Because the circuit court failed to rule on the motion within 90 days the motion was considered overruled. MSEJ appealed. After opinion in the court of appeals, this Court granted transfer pursuant to Mo. Const. art. V, sec. 10.

Standard of Review

In this case, the referee did not observe witness testimony but instead reviewed depositions and documentary evidence. The trial court relied on the referee's findings of fact and conclusions of law. Despite the documentary nature of the evidence, this Court – though it need not defer to credibility determinations made by the trial court – "defers to the trial court as the finder of fact in determinations as to whether there is substantial evidence to support the judgment and whether that judgment is against the weight of the evidence, even where those facts are derived from pleadings, stipulations, exhibits and depositions." *Business Men's Assur. Co. of America v. Graham,* 984 S.W.2d 501, 506 (Mo. banc 1999). In other words, even though this Court has the same opportunity to review the evidence as does the circuit

court, the law allocates the function of fact-finder to the circuit court.

Did the circuit court err in finding that MSEJ failed to support its claims?

The first issue before this Court is whether the circuit court erred in holding that MSEJ failed, prior to March 2001, to adduce sufficient evidence of its claim. This Court holds that it did not err. Local Rule 75.19(c) states that in cases of contested claims, "[t]he burden of proof shall be the same as the burden of proof established by the law of the State of Missouri for contested judicial claims against an insurance carrier." In Missouri, that burden rests on the insured or its assignees – in this case, MSEJ. *See Johnston v. Sweany,* 68 S.W.3d 398, 401 (Mo. banc 2002) ("The burden of proof upon the question of compliance with the provisions of a policy ordinarily rests upon the insured, if he seeks to recover indemnity under the policy, or upon the injured party who stands in the shoes of the insured.").

As discussed above, prior to March 2001, the only evidence submitted to the receiver was a one-page statement by MSEJ that it held claims in the amount of $19 million. That information failed to state the names and injuries of the policyholders and the dates of alleged injuries. The evidence included only the Transit policy numbers and dollar amounts without any additional supporting information. In the absence of any supporting details or dates concerning the

policies that were the subject of MSEJ's claim, the circuit court did not err in finding that the evidence was insufficient to support the claims.

Did Administrative Order 49 bar the submission of supplemental evidence after the March 2001 cutoff date?

Having found that the circuit court did not err in its judgment that the evidence submitted by MSEJ prior to March 2001 was insufficient, this Court next considers whether the referee should have considered evidence submitted after the March deadline. The issue before this Court is whether Administrative Order 49 sets an absolute bar to the filing of additional evidence or proof after March 2001. Because this Court finds that Administrative Order 49 does create such a deadline, this Court need not reach the issue of whether MSEJ is estopped from bringing its claims.

MSEJ contends that the governing instrument concerning supplemental evidence should be section 375.1214.2, which, in MSEJ's view, allows parties to bring additional evidence before the appellate body reviewing the claim denial. Section 375.1214.2 states that following a denial of a claim, an appeal "may be heard by the court or by a court-appointed referee," as it was in the present case. Following the hearing, the "referee shall submit written findings of fact and conclusions of law along with his recommendation for disposition." *Id.* If the appellant disagrees with the

referee's findings, the appellant may file a "motion for reconsideration" that "shall allege either *the existence of new facts* which could not, with reasonable diligence, have been discovered and presented before the referee, or such erroneous conclusions of law, that would justify reconsideration of the claim by the court." *Id.* (emphasis added). MSEJ maintains that this statutory provision should trump Administrative Order 49's time limit.

Administrative Order 49 was enacted pursuant to section 375.670, which empowers the court to "limit and . . . extend the time for the presentation of claims against the receivership" and mandates that "any creditor neglecting to present his claim within the time so limited shall be debarred of all right to share in the assets of the insurer." The real question here is not whether Administrative Order 49 should be trumped by section 375.1214 but rather whether section 375.670 trumps section 375.1214. It does. Sec. 375.670 is intended to empower courts to set reasonable time standards for the resolution of a receivership. The language of Administrative Order 49 reflects that legislative intent in its statement that the filing deadline for the "existing evidence of . . . current unresolved claims" is intended to "expedite the closure of the Receivership." The appellate procedure spelled out in section 375.1214 must be interpreted within the broader goal of an ultimate resolution of the receivership.

It is also worth noting that Manville filed its original notice of claims in 1987. Manville did not buy

any new policies from Transit after 1987. MSEJ purchased its claims from Manville in 1998. The claims MSEJ filed in March of 2001 pertained to policies that had to have been purchased nearly 14 years earlier. MSEJ itself had more than three years, since 1998, to gather evidence and research the outstanding liability on the policies assigned to it by Manville prior to the March 2001 cutoff date. MSEJ does not present any compelling reasons that it was possible to supply that proof in the interim between 2001 and 2005 but not between 1998 and 2001.

Conclusion

Section 375.670 empowers the receivership court to set deadlines. Administrative Order 49 was just such a deadline. MSEJ failed to meet that deadline, and the facets of appellate procedure spelled out in section 375.1214 cannot redeem that failure.

The circuit court's judgment is affirmed.

/s/ _____
Michael A. Wolff, Judge

All concur.

Opinion
Missouri Court of Appeals
Western District

Case Style: MSEJ, LLC, Appellant, v. Transit Casualty Company in Receivership, Respondent.

Case Number: WD68945

Handdown Date: 07-01-2008

Appeal From: Circuit Court of Cole County, Hon. Richard G. Callahan

Counsel for Appellant: Nicholas M. Monaco

Counsel for Respondent: Thomas W. McCarthy III

Opinion Summary:

MSEJ appeals the circuit court's approval for Transit Casualty Company to reject MSEJ's claim to more than $19 million. MSEJ is a Delaware limited liability company that purchased the insurance claims that the defunct Johns-Manville Corporation held against Transit. Transit is a Missouri insurance company that is in a receivership under the circuit court's oversight. MSEJ submitted more than $19 million in claims to the Transit receiver, but, with the circuit court's apparent approval, the receiver rejected them.

REVERSED AND REMANDED.

Division holds: As the first basis for denying MSEJ's claims, the referee found that MSEJ did not provide sufficient evidence to the receiver to support them. On appeal, the referee refused to consider any additional evidence. The circuit court should have allowed MSEJ to provide additional information on appeal. Local Rule 75 required a claimant to submit a written claim in which it had, at least, cited the documents that were in the case file. According to Rule 75.17, these documents would include any additional documents or evidentiary materials that the claimant believed supported his or her position. According to these rules, the referee should have examined MSEJ's supplemental evidence to see whether or not it cured the deficiencies in MSEJ's original claims request.

As the second basis for denying MSEJ's claims, the referee found that MSEJ was equitably estopped from asserting its claims because it had made previous representations to the receiver that it would be making no further claims against the estate. assuming that MSEJ represented to Transit that it did not intend to pursue additional claims and Transit relied on these representations, MSEJ would not be estopped form pursuing additional claims – on this record – because Transit has suffered no prejudice from its reliance. The only prejudice that would have resulted from MSEJ's pursuing additional claims was to lessen the amount of money available to pay other creditors. Transit has cited no cases –

and we have found none – in which harm to a third party is a basis for asserting estoppel.

Citation:

Opinion Author: Paul M. Spinden, Presiding Judge

Opinion Vote: REVERSED AND REMANDED. Welsh and Ahuja, JJ., concur.

Opinion:

MSEJ is a Delaware limited liability company that purchased the insurance claims that the defunct Johns-Manville Corporation held against Transit Casualty Company. Transit is a Missouri insurance company that is in a receivership under the circuit court's oversight. MSEJ submitted more than $19 million in claims to the Transit receiver, but, with the circuit court's apparent approval, the receiver rejected them, and MSEJ appeals.

The receiver rejected MSEJ's claims on the ground that MSEJ did not provide sufficient evidence to support them. A referee appointed by the circuit court affirmed the denial and declared that, because an announced deadline for submitting claims had expired, MSEJ was barred from presenting additional evidence to support the claims. MSEJ filed a motion asking for reconsideration. Pursuant to Section 375.1214, RSMo 2000, the referee's findings of fact

and conclusions of law became final when the circuit court did not rule on MSEJ's motion.

We must affirm the circuit court's judgment unless it is not supported by substantial evidence viewed in the light most favorable to the judgment or is against the weight of the evidence or erroneously declares or applies the law. *Viacom Inc. v. Transit Casualty Company,* 138 S.W.3d 723, 724 (Mo. banc 2004). We reverse the circuit court's judgment because it misapplies the applicable law.

Pursuant to the power accorded by Section 375.670.1, RSMo 2000, Transit's receiver and the circuit court established procedures for claims against Transit, including promulgation of Rule 75, for administering Transit's liquidation. Rule 75.6(b) said:

> The failure of a Claimant to file a Claim on or before December 31, 1987 will result in one of the following:
>
> (1) The SDR [(Special Deputy Receiver)] may admit the Claim as "timely-filed" (i.e.[,] as if it [were] filed on or before December 31, 1987) by applying Receivership Court and Missouri Appellate Court decisions relating to Post-Bar Date Claims (based on the information available) or issue an interlocutory decision to admit the Claim pending receipt of further information. The SDR may then proceed to determine whether the Claim should be allowed or disallowed, in whole or in part, as provided in paragraph 75.7(b) of this Rule. In making this decision

on whether to admit a Post-Bar Date Claim as timely filed, the SDR shall consider the following test:

a. the Claimant did not know of the Claim prior to the December 31, 1987 bar date;

b. the Claimant filed the Claim with the Receivership as promptly as reasonably possible upon learning of the Claim;

c. the Claim is covered by the policy; and

d. allowance of the Claimant's late-filed Claim will not prejudice the orderly administration of the liquidation of the Receivership.

(2) The SDR may, as an interlocutory determination, disallow a Claim as untimely and request the Receivership Court to hear and consider evidence and rule on the reasons for the failure to timely file the Claim prior to making any Determination on the merits of the Claim.

(3) The SDR may disallow the Claim as untimely filed and/or not an allowable claim on the merits in any event.

Rule 75.2(d) defined a "claim" as "any Official Claim Form or any other writing received by the Receivership the content of which would cause an ordinarily and reasonably prudent person to conclude, based

upon reasonable and identifiable evidence, that monies may be owed to a Claimant."

Hence, according to Rules 75.2(d) and 75.6, a claimant had to file evidence by December 31, 1987, that would cause a reasonably prudent person to conclude that Transit owed the claimant money. Rule 75.6 allowed the receiver to accept claims after this deadline for an indefinite period as long as the claim satisfied the test set out in Rule 75.6(b)(1). Rule 75 did not set an absolute deadline when the receiver would no longer accept claims. Rule 75.6 vested the receiver with discretion to determine the appropriate option.

Rule 75.32(b)[1] authorized the circuit court to establish administrative orders that it deemed necessary for administering the estate. Pursuant to this authority, the circuit court enacted Administrative Order No. 49, which said:

> Based upon reports from the Special Deputy Receiver, it is apparent that this Receivership is now in its final stages. In order to expedite the closure of the Receivership, this court has determined that it is necessary that all Class III claimants, as defined by Section 375.70 . . . present evidence of all

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[1] Rule 75.32(b) said, "The Court shall have authority to issue Administrative Orders from time to time, either upon motion of the SDR or *sua sponte*, as it deems reasonable and necessary for the administration of the Receivership and the administration of the Disputed Claims office."

> unresolved claims, whether existing or contingent, to the Special Deputy Receiver so that he can make final determination on such claims.

In order to effectuate this strategy[,] all claimants, including those that have already filed policyholder protection proof of claim forms, must file the existing evidence of their current unresolved claims and any actuarial evidence . . . at their present value, of future claims that may be covered by a Transit policy or other contract by *3/15/01. After that date no new claims or evidence of claims shall be accepted by the Special Deputy Receiver.*[2]

Administrative Order No. 49 set a deadline of March 15, 2001, for submitting claims.

According to well-established law, the circuit court has wide discretion to expedite closure of an estate. *Angoff v. Holland-America Insurance Company,* 937 S.W.2d 213, 217 (Mo. App. 1996). Transit had been in receivership since 1985, and the original deadline for claims was December 31, 1987. Setting March 15, 2001, as the date to close the estate seems reasonable. We do not discern a basis for concluding that the circuit court abused its discretion in setting the deadline in Administrative Order No. 49.

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[2] We added the emphasis.

On March 1, 2001, MSEJ sent the receiver a letter in which it asserted a right to recover for personal injury claims:

> I refer to the legal notice of the March 15, 2001 cut off-date for the submission of Class III claims against Transit Casualty Company. This letter and attachment constitutes the submission of a timely proof of claims on behalf of MSEJ, LLC, which holds . . . all rights to collect insurance . . . for asbestos-related property damage and personal injury claims[.]

To date, the claims that have been asserted against Transit for claims against Johns-Manville have included only property damage claims. We now seek to supplement MSEJ's claims against Transit with the personal injury claims that are covered by the same policies as listed above.

Attached to the letter was a one-page summary of the totals that the Johns-Manville Personal Injury Settlement Trust had paid for personal injuries resulting from asbestos exposure. MSEJ also provided a copy of the trust's consolidated financial statements for the quarter ending on September 30, 2000.

On July 13, 2005, the receiver issued notice that it was denying MSEJ's claims on four grounds: (1) MSEJ filed its claims after the "post bar date" of December 31, 1987; (2) MSEJ's claims were not within the terms of Transit's policy; (3) MSEJ's claims

were not part of the assignment from the property damage trust of Johns-Manville; and (4) MSEJ filed insufficient evidence to support its claims. In affirming the receiver's denial, the referee said in his findings of facts and conclusions of law:

> MSEJ, LLC has failed to meet [its] burden to establish that Administrative Order 49 should not apply and to provide sufficient evidence to establish a claim and therefore the Referee's recommendation is to deny the claims filed on March 1, 2001.

Further, MSEJ, LLC should be estopped from making any further claims in that evidence demonstrates that all of the elements of estoppel as outlined by the Missouri Supreme Court have been met.

Regarding the referee's first basis for denying its claims – that MSEJ presented insufficient evidence to support its claims – MSEJ contends that the circuit court erred for two reasons. First, it had submitted sufficient evidence by March 15, 2001, to support its claims. Second, even if it had not, it should have been allowed to introduce supplemental evidence when it appealed the decision to the referee.

MSEJ concedes that it did not submit certain information by the March 15, 2001, deadline set in Administrative Order No. 49. For example, it did not provide the names of the persons who had made personal injury claims against Johns-Manville, and it did not identify their specific illnesses or injuries.

MSEJ contends that, although some details were not explained, it presented sufficient information to establish that Transit owed MSEJ money. Even if MSEJ is correct that it did not need to provide such details as the names and illnesses or injuries of Johns-Manville's employees – a very dubious proposition – the record establishes that it did not provide sufficient evidence by March 15, 2001. MSEJ presented no evidence that the injuries were first diagnosed within the policy period, and it did not submit evidence of any collateral payouts from workers' compensation, unemployment compensation, or disability benefits law. The referee also had the deposition testimony of William Barbagallo, an employee of Navigator Consulting who specialized in insolvency and claims audits. He noted that MSEJ's evidence included only the Transit policy numbers and gross dollars amounts and did not include any actuarial information or any information regarding specific exhaustion information by the underlying carrier.

On appeal, MSEJ does not dispute these findings. We do not discern a sound basis for concluding that the referee erred in concluding that the receiver correctly determined that MSEJ failed to provide sufficient evidence for its claims by March 15, 2001.

Hence, for MSEJ to maintain its claims, it had to establish that the referee wrongfully denied it an opportunity to produce supplemental evidence when he reviewed its claim. MSEJ asserts that Section 375.1214.2 gave it a right to present supplemental

evidence. Section 375.1214 required the circuit court or its referee to review the receiver's denial of a claim.[3] If either affirmed the denial, the statute authorized the claimant to file a motion for reconsideration with the circuit court.

Concerning review by the referee, Section 375.1214 is silent concerning a claimant's right to present additional evidence. It says only, "The matter may be heard by the court or by a court-appointed

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[3] Section 375.1214.2 says, "Whenever objections are filed with the liquidator and the liquidator does not alter his denial of the claim as a result of the objections, the liquidator shall ask the court for a hearing as soon as practicable and give notice of the hearing by first class mail to the claimant or his attorney and to any other persons directly affected, not less than ten nor more than thirty days before the date of the hearing. The matter may be heard by the court or by a court-appointed referee. Hearings before court-appointed referees shall be conducted in an informal manner and the formal rules of evidence shall not apply. The referee shall submit written findings of fact and conclusions of law along with his recommendation for disposition which shall become final if a motion for reconsideration before the court is not filed by the liquidator or claimant with the court within fifteen days that notice of such findings and conclusions is mailed to the parties. The motion for reconsideration shall allege either the existence of new facts which could not, with reasonable diligence, have been discovered and presented before the referee, or such erroneous conclusions of law, that would justify reconsideration of the claim by the court. A motion for reconsideration based upon erroneous conclusions of law may be decided by the court, after opportunity for response by the prevailing party, without necessity of hearing. A motion for reconsideration not ruled upon by the court within ninety days after the motion is filed shall be deemed denied for purposes of appeal."

referee. Hearings before court-appointed referees shall be conducted in an informal manner and the formal rules of evidence shall not apply."

MSEJ contends that Administrative Order No. 49 was not a proper basis for prohibiting it from introducing supplemental evidence. It asserts that the order unambiguously prohibited only the receiver from accepting additional evidence after March 15, 2001, and that nothing in the order limited what evidence a claimant could introduce at a hearing held pursuant to Section 375.1214. It further argues that, because Administrative Order No. 49 did not mention Section 375.1214 and did not refer to the referee, the order did not limit the type of evidence that the referee was required or authorized to examine.

We agree that Administrative Order No. 49 was not the governing instrument. By the order's express language, the March 15, 2001, deadline applied only to the receiver and did not pertain to whether or not a claimant could submit supplemental evidence on appeal to the referee.

The governing instrument was Rule 75. It governed procedures for making claims, including what evidence a claimant had to present in support of a claim. Rule 75.13 said:

> Each Disputed Claim shall be adjudicated by the Receivership Court or Referee on the basis of written submissions and oral arguments as set forth in paragraph 75.18 of this Rule, unless either the Claimant whose

> Claim is currently under consideration or the SDR files a request for an evidentiary hearing with the Receivership Court to be conducted in accordance with the procedures set forth in paragraph 75.22 of this Rule.

MSEJ originally requested an evidentiary hearing but withdrew the request and submitted to an oral argument under Rule 75.18. Rule 75.18 declared that Rule 75.19 governed oral argument, and Rule 75.19 said:

> a. Unless the Receivership Court has granted a request for an evidentiary hearing in a Disputed Claim proceeding, the Disputed Claim proceeding will be conducted based on the written submissions and oral argument of the Participants. . . . *In preparing the written submissions, the Participants may only rely upon, summarize and quote directly from the documents in the Case File and the documents produced in the mandatory disclosures,* as well as any discovery allowed by the Court. . . . No other submissions shall be made by the Participants unless specifically requested by the Receivership Court or Referee.
>
> b. The written submissions shall include: (1) a statement of the contested issues of fact and law to be determined by the Receivership Court or Referee; (2) a list of

> exhibits relied upon, including affidavits submitted; and (3) a legal brief.[4]

Rule 75.17(a) added:

> [T]he Claimant shall provide the SDR and the Clerk . . . with a written submission stating the amount the Claimant asserts is due under the Transit policy or policies, the method of calculation of the amounts owed and the allocation methodology (if applicable), *along with any additional documents or other evidentiary material that the Claimant contends support the amount claimed due or are relevant to the subject of the Certified Question.* These documents submissions will be considered "mandatory disclosures."[5]

These rules required a claimant to submit a written claim in which it could rely on documents that were in the case file and "documents produced in mandatory disclosure." According to Rule 75.17, these documents would include any additional documents or evidentiary materials that the claimant believed supported his or her position. Hence, although Administrative Order No. 49 prohibited the receiver from examining any evidence after March 15, 2001, Rule 75.19 and Rule 75.17 set out no such limitations. These rules required the referee to examine MSEJ's written submission to determine whether or not it

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[4] We added the emphasis.

[5] We added the emphasis.

cited to supplemental evidence that would cure the deficiencies in MSEJ's original claims request.

Transit argues that this interpretation of the rules is at odds with Administrative Order No. 49's stated purpose of closing up the estate. Transit reasons that setting a deadline for submitting evidence but then allowing a claimant to submit that evidence when it appeals the receiver's decision makes little sense. Although this is a reasonable and pragmatic argument, it is contrary to Rule 75, which allows the claimant to cite to additional evidence – beyond "the documents in the case file" – in the claimant's written submissions to the referee. It also is contrary to Administrative Order No. 49, which expressly applied the March 15, 2001, deadline only to the receiver's action. Moreover, we find it plausible that the court would set a deadline for submitting new claims to the receiver but would permit additional evidence for those claims already in the process and to be submitted to the referee. MSEJ met the order's deadline for submitting its claims to the receiver. Having met that deadline, Rule 75 provides that the referee could, on appeal, consider supplemental information. Hence, the referee erred in not examining MSEJ's supplemental evidence to determine whether or not it established that Transit owed MSEJ money.

As the second basis for denying MSEJ's claims, the referee found that MSEJ was equitably estopped from asserting its claims because it had made previous representations to the receiver that it would be making no further claims against the estate.

Estoppel, disfavored by courts, consists of three elements: (1) an admission, statement, or act by the person to be estopped that is inconsistent with the claim that is later asserted and sued upon; (2) an action taken by a second party on the faith of such admission, statement or act; and (3) an injury to the second party which would result if the first party is permitted to contradict or repudiate his admission, statement or act.

Barry Simon Development, Inc. v. Hale, 210 S.W.3d 312, 317 (Mo.App.2006). Each element must be established by clear and sufficient evidence. *Finova Capital Corporation v. Ream,* 230 S.W.3d 35, 51 (Mo.App.2007).

Assuming that MSEJ represented to Transit that it did not intend to pursue additional claims and Transit relied on these representations, MSEJ would not be estopped from pursuing additional claims – on this record – because Transit has suffered no prejudice from its reliance. The only prejudice that would have resulted from MSEJ's pursuing additional claims was to lessen the amount of money available to pay other creditors. Transit has cited no cases – and we have found none – in which harm to a third party is a basis for asserting estoppel. The referee erred in holding, based on this record, that equitable estoppel barred MSEJ's claims.[6]

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[6] The referee also found that "[s]ome time prior to 2001," and in reliance on MSEJ's or Johns-Man[s]ville's statements or

(Continued on following page)

The referee's two grounds for denying MSEJ's claims, therefore, were insufficient. On remand, the referee shall examine the receiver's four grounds for denying MSEJ's claims and make express findings on all four. In reviewing the receiver's fourth reason – that the evidence submitted, by March 15, 2001, was insufficient – the referee must examine MSEJ's written submission to determine whether or not it cited to supplemental evidence that cured the deficiencies in MSEJ's original claims request. The referee may also permit Transit to present additional evidence in support of its estoppel argument.

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conduct, "Transit commuted the reinsurance on the Man[s]ville claims" and "did not have anyway to recover reinsurance on the new claims made by MSEJ." As MSEJ points out, however, Transit presented no evidence of any specific reinsurance settlement that it entered in reliance on or how that settlement was impacted by the conduct purportedly establishing estoppel. This issue remains open on remand.

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

In re:	)	Case No.
TRANSIT CASUALTY COMPANY	)	CV185-1206CC
	)	Division II
MSEJ, L.L.C., successor in interest to Johns-Manville Corporation	)	DISPUTED CLAIM
	)	(Filed Jul. 2, 2007)
Claimant,	)	
TRANSIT CASUALTY COMPANY IN RECEIVERSHIP,	)	
Respondent.	)	

REFEREE'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

COMES NOW Referee, Joseph E. Maxwell and files his Findings of Fact, Conclusions of Law and Recommendations in the Disputed Claim with Claimant MSEJ, L.L.C. and Transit Casualty Company in Receivership ("Transit").

FINDINGS OF PROCEDURAL FACTS

The following facts were established by documents produced by the parties during the course of the disputed claims proceeding and the disputed claims file, the parties' briefs filed in this proceeding and the transcripts of the proceedings. The Parties

could not agree on a single fact; therefore, there is not a Stipulation of Facts. The Claimant withdrew its request for an evidentiary hearing and at the conclusion of the initial Case Management Conference the parties stated that they would rely on the record. However, at the final Case Management Conference, Transit did request discovery and two depositions were taken.

1. Transit was incorporated in the State of Missouri as an insurance company in 1945 and, since that time, has conducted the business of insurance.

2. Transit issued six excess umbrella policies to Johns-Manville Corporation, which are the subject of the disputed claim.

3. On August 26, 1982, the Debtors, Johns-Manville Corporation and its affiliate Johns Manville Sales Corporation producers of asbestos containing building materials filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court Southern District of New York (the "Bankruptcy Court").

4. The "Debtors' Second Amended and Restated Plan of Reorganization" (the Plan) was confirmed by order of the Bankruptcy Court on December 22, 1986 and was substantially consummated on December 28, 1988.

5. The Bankruptcy Court created two trusts: The Manville Personal Injury Settlement Trust and the Manville Property Damage Trust.

6. The Bankruptcy Court ordered that when the Manville Personal Injury Settlement Trust received $615,000,000.00, then all assets to include insurance proceeds were to go to the Manville Property Damage Trust.

7. Prior to Transit issuing a payment, on August 15, 1989, the Manville Personal Injury Settlement Trust reached the Bankruptcy Court's pre-determined threshold amount of $615,000,000.00 requiring all future payments for both Personal Injury and Property Damage to be paid to the Property Damage Trust. This included the payments from the six (6) insurance policies issued by Transit. Manville 698-700.

8. The Manville Property Damage Settlement Trust (the "PD Trust") was established by the Plan and the PD Trust was assigned the rights to certain insurance proceeds from various insurance policies to include six (6) insurance policies issued by Transit, collectively the "Policies".

9. On June 10, 1987 the PD Trustee filed pursuant to Local Rule 75.2(s) a Policyholder Protection Claim. MANV 295-310

10. December 31, 1987 is the Court Ordered "Bar-Date".

11. On April 12, 1995, Transit issued notices of determination to the PD Trust in the amount of $24,416,667.67 for claims. The allowance was split $17,071,241.62 to the PD Trust and $7,345,225.10 to the State Guaranty Funds. MANV 548-554.

12. In 1998, MSEJ, LLC, a Delaware Limited Liability Company, purchased all rights, title and interest in and to claims against Transit held by the PD Trust under the Policies. The terms of this assignment are set out in an Amended Deed of Assignment, dated January 14, 1998 (the "Assignment"), and was approved by the Bankruptcy Court on January 15, 1998.

13. On March 1, 2001, MSEJ submitted additional claims arising out of the Policies for $19,416,667.00 MANV 502-504 and MANV 508.541.

14. March 15, 2001, Administrative Order 49 went into effect.

15. The Parties agree that on May 1, 2001 Transit issued a denial Notice of Determination.

16. On June 22, 2001, MSEJ submitted its Request For Review MANV 499-501

17. July 13, 2001 Transit issued its Notice of Re-Determination allowing an amount of $100,000.00.

18. On December 7, 2001 the Receivership Court held a settlement conference and the parties submitted written Summary of Claims to assist the court. In that it was to discuss settlement, no docket entry was made nor transcript maintained. See MSEJ's brief November 27, 2006.

19. Subject to the authority granted to the SDR by Local Rule 75.2(c) or 75.8, 75.7(a) the SDR

filed a Motion to Certify Coverage Questions on January 29, 2003.

20. Pursuant to the language contained in the Receivership Court's Order of Reference dated December 7, 2001 the certified questions were referred to Special Master Dalton for determination pursuant to Mo. R. Civ. P. 68.01.

21. On February 10, 2003, Attorneys for the Claimant, MSEJ, LLC filed with the Receivership Court a "Notice of Intent to Oppose Transit's Motion to Certify Questions"

22. Attorneys for Claimant MSEJ, LLC filed "Claimant MSEJ's Suggestions in Opposition to Transit's Motion to Certify Coverage Questions" on February 13, 2003.

23. In March, 2003, MSEJ, LLC filed a motion with the United States Bankruptcy Court Southern District of New York asking it to determine the scope of the assignment of the claims assigned from Manville Property Damage Settlement Trust to MSEJ, LLC. They argued that one of the certified questions involved the interpretation of the scope of the assignment and that they had the sole jurisdiction to make such a determination.

24. On March 26, 2003 the United States Bankruptcy Court Southern District of New York, issued their order which stated that MSEJ had been assigned all rights, title, and interest in and to the claims against Transit

and that it was not limited to amounts previously allowed by Transit.

25. On July 13, 2005 Transit issued a Notice of Re-determination to MSEJ allowing $100.000.00.

26. On September 7, 2005 MSEJ answered the Re-Determination with a request for Review and Claimant's Petition for Application to File Post-Bar Date Claims and Objection to Denial by Liquidator. MANV 917-1475 MSEJ later recanted the term Post-Bar Date as a misnomer. See Claimant Brief November 27, 2006

27. On October 24, 2005 Transit filed its Notice of Disputed Claim Transmittal.

28. On November 23, 2005, MSEJ filed Further Suggestions in Opposition to Transit's Motion to Certify Coverage Questions.

29. On December 7, 2005 MSEJ filed its Notice of Filing and Request for Evidentiary Hearing, pursuant to Rule 75.13.

30. On January 9, 2006, Special Master Dalton held a Case Management Conference by conference call with the parties. No court reporter was requested and therefore no transcript of the proceeding is available.

31. On January 18, 2006 Special Master Dalton issued a Case Management Order directing the parties to exchange witness lists and further ordered the parties to submit a Stipulation of Facts to the court on or before March 10, 2006. The Special Master also

stated in his order that when the stipulation of facts had been submitted another conference would be set. (The parties could not agree on even one fact and therefore no stipulation was submitted.) The order did not provide for an evidentiary hearing nor did it address any other issues on the docket. (MSEJ has stated in their Suggestions Arising from the Court Order of December 7, 2006 that during this Case Management Conference, they, MSEJ, had concurred that even though they had requested an evidentiary hearing pursuant to Local Rule 75.13 none was necessary.) (In MSEJ's Brief filed November 27, 2006, MSEJ stated that the issue of the Certified Questions were raised at the initial Case Management Conference and that Transit took the position that the questions were now moot and MSEJ had contested that characterization.)

32. Sometime in March MSEJ received from Transit a Motion for Appointment of a New Referee and for a stay of the proceedings. This motion was filed March 17, 2006.

33. On March 14, 2006 MSEJ filed a response to Transit's Motion conceding to the appointment of a new Special Master and further, agreed that the matter can be resolved based on the record.

34. June 5, 2006, the Receivership Court held a hearing on Transit's Motion; the Court determined that it would not be hearing the case and that it would appoint a Substitute Special Master.

35. On August 24, 2006 the Circuit Court of Cole County, the Receivership Court, appointed Joseph E. Maxwell as the Substitute Special Master.

36. On November 1, 2006, the Receivership Court clarified its Order of Reference that referred the disputed claim to Joseph E. Maxwell as both the Special Master and as the Referee.

37. On December 8, 2006, the Receivership Court further ordered Special Master-Referee Joseph E. Maxwell to "proceed with all reasonable diligence to issue a final Case Management Order."

38. On December 22, 2006, Special Master Joe Maxwell held the Final Case Management Conference, Special Master Dalton having held the initial Case Management Conference on January 9, 2006.

39. On March 2, 2007 MSEJ filed their Written Submission in Support of the Allowance of the Claims of MSEJ, LLC, Assignee of the Johns-Manville Corp., hereinafter MSEJ's Written Submission.

40. On April 2, 2007, Transit filed their Transit's Brief in Opposition to Claimant's Written Submission in Support of Allowance of Its Claims, hereinafter, Transit's Brief.

41. On May 2, 2007, Oral Arguments were held.

CONCLUSIONS OF LAW

1. The Circuit Court of Cole County has jurisdiction over this matter pursuant to §§ 375.650 to 375.750, 375.950 to 375.990 and 375.1150 to 375.1246, RSMo 2000 and is the Receivership Court.

2. Pursuant to § 375.670 RSMo 2000 the Circuit Court of Cole County enacted Third Amended Rule 75 ("Rule 75"), which governs practice and procedures in the Transit Receivership.

3. Supreme Court Rule 68.01 provides the Circuit Court of Cole County the authority to appoint a Special Master and the authority to reference this disputed claim to the Special Master.

4. On August 24, 2006 the Receivership Court, pursuant to Mo. R. Civ. P. 68.01, and Local Rule 75.29, appointed Joseph E. Maxwell as Substitute Special Master by Order of Reference.

5. Special Master Joseph E. Maxwell was further appointed Substitute Special Master and Referee by Order of Reference dated November 1, 2006, pursuant to Mo. R. Civ. P. 68.01, § 375.1214 RSMo 2000, Local Rule 75.29 and as defined in Local Rule 75.2 w.

6. All of Transit's disputed claims and certified question proceedings were referred to Special Master James P. Dalton pursuant to order of the Receivership Court Dated December 7, 2001.

7. Rule 75.29 required Joseph E, Maxwell as the Substitute Special Master/Referee to "continue with the Disputed Claim or Certified Question proceeding . . . " Local Rule 75.29

8. Rule 75.23 provides the time allowed for a decision to be made. It states in part, "The Receivership Court, Referee, or Special Master shall rule on the Disputed Claim or Certified Question within sixty (60) days after the completion of the filing of the written submissions and oral argument or at the close of the evidentiary hearing."

9. Section 375.670 provides the authority for the Court to establish claims procedures which limit or extend the time for presentation of claims against the receivership. Utilizing this authority the Court issued Local Rule 75 and Administrative Order 49.

10. December 31, 1987 is the Bar Date for filing a proof of claim. See *Artra Group Incorporated v. Transit Casualty Company in Receivership*, Case No. No. CV185-1206CC-Certified Question Proceeding (Cir.Ct.Cole Cty. Mo 4/25/03).

11. Administrative Order 49 is not contrary to the provisions of law governing liquidation procedures nor is it contrary to any supreme court rule as contemplated by Section 375.1208.2.

12. The statutes governing the liquidation process are not an abuse of the states police power and do protect both individual and

public interest. See *Medallion Ins. Co. v. Wartenbee*, 568 S.W. 2d 599, 601 (Mo. App 1978) *citing State ex rel. Missouri State life Ins. Co. v. Hall*, 330 Mo. 1107, 52 S.W.2d 174, 177 (banc 1932).

13. Administrative Order 49 is not an abuse of the states police power and the receivership court can issue such cut off dates to expedite the closure of an estate. See *Angoff v. Holland-America Ins. Co. Trust*, 937 S.W.2d 213 (Mo. App. 1996).

14. The legal theory of estoppel requires "(1) an admission, statement or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act." *Brown v. State Farm Mutual Automobile Insurance Company*, 776 S.W.2d 384 (Mo. Banc 1989) *citing Mississippi-Fox River Drainage Dist.*, 735 S.W.2d at 754.

15. Pursuant to Rule 75.19(c), "the burden of proof shall be the same as the burden of proof established by the law of the State of Missouri for contested judicial claims against an insurance carrier." It is the insured, herein MSEJ, LLC, who has the burden. *See Southeast Baker Feeds, Inc. v. Ranger Ins. Co.*, 974 S.W.2d 635 (Mo. App. 1998).

REFEREE'S FINDINGS OF DISPUTED CLAIMS FACTS AND DISCUSSION

I.

MSEJ, LLC SHOULD BE ESTOPPED FROM MAKING ANY FURTHER CLAIMS

1. There has been much confusion in regards to this claim. Some of which has been brought on by the tremendous delay in time from the date of the filing of the original Notice of Determination, the fact that the rights to any and all claims were assigned by a bankruptcy court in New York to MSEJ, LLC and that most of the original parties are no longer in the disputed claims proceeding and the original employees of Transit are no longer employed by Transit.

2. Much of this disputed claim relies on the original proof of claims and the original allowance. Yet none of the Transit employees which made the determination were still employed in March 2001 when MSEJ, LLC filed the new claims.

3. It is also evident that some of the confusion as to what claims the original allowance was based on is because all of the proceeds of the allowance were paid into the Manville Property Damage Settlement Trust. This was done not because the claims were solely based on property damage but rather because the Bankruptcy Court had ordered that when the Manville Personal Injury Settlement Trust had reached $615,000,000 all insurance proceeds were to be paid into

the Property Damage Trust. By the time Transit began to make payments, the Personal Injury Trust had reached this threshold.

4. Another point of confusion has been that the statements and arguments of MSEJ, LLC have changed with time making it difficult to pin down their arguments and their theory of recovery. As an example, MSEJ, LLC has changed the characterization of the March 1, 2001 filings which are the subject of this disputed claim.

5. In MSEJ's March 1, 2001 filing, they stated that they were filing new claims and did file new proof of claims. The letter from Quantum Consulting, Inc, written on behalf of MSEJ, LLC, to Transit dated March 1, 2001 in regards to the Additional Proof of Claim of Manville Property Damage Settlement Trust (assigned to MSEJ, LLC) clearly states this fact. In the letter, Mr. Scognamiglio states that the prior claims against Transit were only for property damage claims and that the March 1, 2001 letter was being sent to assert new personal injury claims against Transit MANV 508-509.

6. Further, Mr. Scognamiglio completed a Post Bar Date Official Form for each of the six policies. Mr. Scognamiglio reiterated his belief in each of the forms that the previous monies paid had been for property damage only and that now MSEJ, LLC was seeking coverage under the personal injury claims

only. MANV 522-539 MSEJ, LLC restates this allegation in their letter dated June 22, 2001 sent by Mr. Scognamiglio to Mr. William Barbagallo and Carol Bates both Transit employees. In referring to the previously allowed claim of $24,416,466.67, of which $17,071,241.62 was paid to the Receivership to Manville "This amount pertains to property damage claims . . . " They further stated, "We write, however, to request a review of Transit's determination of the amount disallowed by the Receivership in the amount of $24,416,466.72. This sum pertains to personal injury claims and is in addition to the allowed property claims." *Id.*

7. In moving away from the position that what was filed were new proof of claims, MSEJ, LLC's Written Submission, MSEJ, LLC acknowledges that the 1987 Bar Date and not the March 15, 2001 date of Administrative Order 49, is the date for which no new claims can be filed. MSEJ, LLC's Written Submission at p. 3-5. Transit agrees with this position. This issue was decided by the Receivership Court in its decision in *Artra Group Incorporated v. Transit Casualty Company in Receivership*, Case No. CV185-1206CC Certified Question Proceeding (Cir.Ct. Cole Cty. Mo. 4/25.03). The Claimant in *Artra* was attempting to use the courts order, Administrative Order 49, as providing for a new bar date. The Court rejected the Claimant's theory reiterating the 1987 date as the Court Ordered Bar Date.

8. Therefore, in their Written Submissions MSEJ, LLC argues that what was filed on March 1, 2001 was not new proof of claims but rather was "evidence in support of unresolved claims under separate lines of coverage provided under the policies that had not been exhausted by the initial allowance in 1995." MSEJ, LLC's Written Submission at p. 4 MSEJ, LLC stated that this information was provided in response to Administrative Order 49. MSEJ, LLC's Written Submission at p. 3.

9. In regards to MSEJ, LLC's assertion that the original allowance was for property damage claims only, they now state in their Written Submission that it can not be determined what claims the allowance was based on. MSEJ, LLC's Written Submission at p. 15.

10. There is no evidence in the disputed claim file to support the claims of MSEJ, LLC that the original allowance was for property damage claims only. The March 1, 2001 letter is the first time the issue of the prior allowance being based solely on property damage claims is raised by MSEJ, their predecessors in interest, Manville Corp., the Manville Property Damage Settlement Trust or by Transit.

11. In order to make a recommendation in this disputed claim, it is imperative that the facts surrounding the original Notice of Determination which provided for an allowance of $24,416,466.67 be outlined. In that much of the facts are based on a prior Notice

of Determination but are relevant to this Disputed Claim, the Referee has chosen to set them out within this statement of conclusions and recommendations.

12. On June 10, 1987 Transit received six Official Claim Forms from the Manville Corporation each for a separate policy, each with an attachment in reply to the Official Claim Form's request for the Facts. Five of the Official Claim Forms set out a statement of the Policies limits. (SCU955601 $8,000,000.00, SCU955985 5,000,000.00, SCU955986 1,000,000.00, SCU956266, 6,300,000.00 and SCU956267 3,700,000.00) MANV 298, 304, 306, 308, 310. The sixth policy, SCU 955540, was for a coverage period of May 2, 1980 – July 1, 1980 and asked for the policy limits. MANV 296. The facts of these Official Claims Forms were affirmed by the Sr. Vice President and General Counsel for the Manville Corp. The contact person named on all six Official Claims Forms was Kathleen S. Page, Counsel for Manville Corporation. MANV 295-310

13. The attached fact sheet for all of the Official Claims Forms stated in the third paragraph that Manville had "numerous claims made against it by individuals alleging bodily injury resulting from use of or exposure to products mined, manufactured or distributed by Manville, including without limitation, asbestos or asbestos containing products. Manville has also had numerous claims

made against it by claimants alleging property damage resulting from the use or installation of products, including without limitation, asbestos or asbestos containing products. MANV 296, 298, 304, 306, 308, 310. The fourth paragraph of the attached fact sheet of the Official Claims Forms stated, "The limits of the liability of Transit policy no. ___ is ___ per occurrence, and ___ in the aggregate where applicable, excess of stated underlying insurances." The above stated amounts were inserted in the appropriate space. MANV 296, 298, 304, 308, 310. MSEJ, LLC in their Written Submission acknowledges these to be the "timely-filed policyholder proofs of claim." (MSEJ Written Submission at p.3)

14. These were timely filed prior to the December 1987 bar date.

15. By the end of 1988 the "Debtors' Second Amended and Restated Plan of Reorganization" (the Plan) was confirmed by order of the Bankruptcy Court and was substantially consummated on November 28, 1988. In a letter to the Oregon Insurance Guaranty Association dated March 8, 1989 from Mr. Theodore V.H. Mayer, attorney for the Manville Property Damage Settlement Trust, stated that the plan for reorganization had established two trusts, the Manville Personal Injury Settlement Trust and the Manville Property Damage Settlement Trust. He further stated that in accordance with the reorganization plan the PI trust was to

receive the first $615,000,000.00 and then the PD trust was to be entitled to all proceeds in excess of that amount. Because payments and/or settlements for insurance proceeds had exceeded the $615,000,000.00, he was informing the Oregon Insurance Guaranty that they would be pursuing any and all asbestos-related claims for coverage under policies issued by . . . Transit Casualty Company to Manville. He went on to outline the amount of coverage each Transit policy had and the policy period. These Policy Numbers, Policy Periods, and Amount of Coverage coincided with those for which were included in the Official Claims Forms. (SCU955601 $8,000,000.00, SCU955985 5,000,000.00, SCU955986 1,000,000.00, SCU956266, 6,300,000.00 and SCU956267 3,700,000.00) MANV 298, 304, 306, 308, 310.. The letter did not include any information in regards to Policy Number SCU955540. (Policy for which attached fact sheet had asked for the policy limits) MANV 702-704.

16. In a letter dated November 8, 1989 addressed to Alex Bartlett with Transit Casualty Company, Mr. Mayer attempted to follow up on concerns Transit had raised in an October 10th meeting. He outlined the Bankruptcy Court's confirmation order clarifying that it was the Property Damage Trust which had all rights to the proceeds from Transit coverage in that the Personal Injury trust had reached the $615,000,000.00 threshold. He also answered questions

Transit had in regards to this issue of agreements for settling below the line coverage. MANV 699-701.

17. Mr. Mayer further stated that upon request a certificate from the Personal Injury Trust stating that the threshold of $615,000,000.00 had been met on August 15, 1989 would be provided to Transit. MANV 699. On May 3, 1990, in response to a letter dated April 20, 1990 addressed to Mr. Mayer, Christina Burkholder, Deputy General Counsel for the Manville Personal Injury Settlement Trust, certified that the Manville Personal Injury Settlement Trust had collected $615,000,000.00 and "Accordingly, this Trust is no longer entitled to receive any more insurance proceeds . . . All future insurance proceeds should be directed to and are the property of the Property Damage Trust. Pursuant to certain settlement agreements relating to these insurance proceeds, the Property Damage Trust is entitled to use the dollar value of claims paid by the Personal Injury Trust in order to establish the Property Damage Trust's right to collect certain additional insurance amounts." MANV 698.

18. Relying on the information provided by Mr. Mayer and Ms. Burkholder, Transit set out establishing the amount to be allowed pursuant to the proof of claims. In an internal memorandum dated May 18, 1990, Transit Employee Leonard Herscovitch outlined the basis for a $24,250,000.00 allowance

establishing the limits of the policies as, SCU 955540 $250,000.00, SCU955601 $8,000,000.00, SCU955985 5,000,000.00, SCU955986 1,000,000.00, SCU956266, 6,300,000.00 and SCU956267 3,700,000.00 MANV 711. As per the settlement for which Ms. Burkholder referred to, these amounts were calculated based on claims for both Bodily Injury and Property Damage. Total settlements paid out as of this time were shown as Bodily Injury, $935,404,992 and Property Damage of $202,000,000. By way of calculation it was determined that the amount of claims per year would be $56.8 million. It was concluded that Transit's total impairment' would be $24,250,000. MANV 705-711.

19. Leonard H. Herscovitch reported to Mark R. Peard in a memo dated August 27, 1990 that the Johns-Manville Trust had provided documentation of a listing of all bodily injury of all claims settled, broken down by claimant and by state with first diagnosis after July 1, 1980, with date of diagnosis for each of the claimants and payment after August 31, 1989 totaling $85,884,336. They also had provided a listing by state of the unpaid bodily injury liability totaling $395,105,748. The Property Damage Trust also provided Transit with a breakdown by state of payments equaling $75,384,644 and unpaid liability of $217,042,483.

20. The trust had also provided the settlement documentation by date of diagnosis and the

date of payment. They also had provided Transit with payments and policy settlements of the other carriers.

21. Transit had also received a listing of claims not settled and not yet ready for settlement. MANV 420-421.

22. Based on the comprehensive information provided by the trust on both Personal Injury and Property Damage, on the same day as the Herscovitch memo, August 27, 1990, Mark R. Peard, Assistant Claims Manager for Transit, sent to Mr. Burleigh Arnold, Special Deputy Receiver for Transit, a Inter-Office Correspondence stating that the claims of Johns-Manville Corporation should be allowed in the amount of $24,250,000. He also notified Mr. Arnold that the reinsurance behind the claims had been notified of such claims. Mr. Arnold allowed the claims on August 31, 1990. MANV 419.

23. An additional Inter-Office Correspondence was sent to Mark Peard by Leonard Herscovitch on September 28, 1990 stating that after re-review of policy number SCU955540 (this is the policy for which the original Official Claims Forms had indicated "policy limits" MANV 296) that the coverage for the two month period should have been $416,466.67 and not the $250,000.00. He recommended the change to the notice of determination. On October 1, 1990 Mr. Peard agreed and signed off on the change. MANV 422.

24. On December 14, 1990, Mr. Mayer asked for a formal notification of Transit's "allowance in full of the PD Trust's claim in an amount certain" MANV 695.

25. Vincent Affinito, Claims Manager for Transit, responded to Mr. Mayer's request on December 19, 1990. He informed Mr. Mayer that the claims totaled $24,416,466.67. He also attached a list by policy number and amount per policy – 955540 $416,466.67, SCU955601 $8,000,000.00, SCU955985 5,000,000.00, SCU955986 1,000,000.00, SCU956266, 6,300,000.00 and SCU956267 3,700,000.00. MANV 689-690.

26. During this same time period, Manville was working to reach an agreement with the various State Guarantee Associations. According to a statement made by the Property Damage Trust, Manville had reached a settlement agreement with the Colorado Insurance Guarantee Association and with the other state's associations in March 1991. MANV 395 also MANV 712-916.

27. Within the settlement agreement with the majority of the state's guarantee associations, it is clear the settlement in relation to the Transit policies, was based on the value or face amount of $24,000,000 (did not include policy SCU955540) MANV 742-743. Based on an agreed to 30% of the $24,000,000, it was agreed that the state guarantee associations would share in 13.75% of the recoveries from Transit. MANV 744.

28. No further information or claims were filed by the Property Damage Trust and on July 19, 1994, Mr. Mayer requested that James C. Owen, Transit's legal counsel to amend his service list for Major Creditors by placing him on the list as legal counsel for the Manville Property Damage Settlement Trust. He reiterated that it was this trust which owned the allowed claims.

29. On August 4, 1994, Mr. Mayer asked Mr. Herscovitch of Transit to explain why he was receiving a series of Notice of Determinations. On August 4, 1994, Mr. Herscovitch responded to Mr. Mayer's inquiry and explained that the Notice of Determinations were to inform "each insured that the Receivership did receive the claim, and made a decision based on the Proof of Claim filing, coverage and claims documentation." The notice also provided each state with the amount of their expenses for each policy. MANV 681.

30. In response to a faxed inquiry, Mr. James Hamilton of Transit, confirmed the amounts of the Property Damage Trust share of the allowance. MANV 680. On August 18, 1994, Mr. Mayer responded to the amounts by stating, "I acknowledge the Trust's understanding and acceptance of the allowances reflected in your letter. MANV 678.

31. On April 12, 1995, Notices of Determination were sent to Manville Property Damage Settlement Trust showing allowances of $17,071,241.62 to Manville Property Damage

Settlement Trust and $7,345.225.10 being allocated among the various state guarantee associations.

32. On April 20, 1995 Mr. Mayer acknowledged the receipt and accepted the amounts of the allowance and forwarded his acceptance to Transit. MANV336-347, 656.

33. No further communication occurred between the parties until 1997 which based on the record was the time period for which the Mr. Mayer was attempting to sell off the assets of the Manville Property Damage Settlement Trust. One of the assets was the Transit allowance. MANV 621-622. In a July 22, 1997 correspondence, Mr. Mayer reassured Transit that the "assignment does not seek to augment any rights that the PD Trust has against your estate or otherwise to create new obligations or liabilities on the part of the Liquidator. The proposed assignment simply constitutes the transfer to another party of the PD Trust's existing and established rights to collect on those claims together with all rights of the PD Trust with respect to those collections." *Id.*

34. A series of letters were exchanged between the parties which now included MSEJ, LLC as the expected assignee of the rights to the Transit policies.

35. On October 27, 1997, Marcia S. Ruskin an attorney representing MSEJ, drafted a letter to Stephen E. Wunderlich, Executive Claims Analyst for Transit, stating that she was

following up on a conversation she and Joe Scognamiglio had had with Mr. Wunderlich and his counsel the previous week. She outlined the facts of the assignment and asked that Transit be willing to make certain representations. Among those was "Based on claims previously submitted to Transit, the policy limits of each of the policies have been exhausted, the maximum amounts payable under the Policies have already been issued, and no additional claims can be asserted under the Policies." MANV 618-619.

36. In a letter dated November 10, 1997 Ms. Ruskin informed Mr. Wunderlich that MSEJ was about ready to go forward with the assignment of the Manville claims but had not yet received a response from her October 27, 1997 letter to him. MANV 613.

37. Then beginning on November 26, 1997, Mr. Mayer on behalf of the Manville Property Damage Settlement Trust asks that Mr. James C. Owen, legal counsel for Transit to make the agreed to representations. These representations continued to include the statement that the policies were exhausted, "Based on claims previously submitted to Transit, the policy limits of each of the Policies have been exhausted." MANV 607-608.

38. Handwritten changes to the November 26, 1997 letter were made by Transit and on December 19, 1997, Mr. Mayer wrote asking James C. Owen, legal counsel for Transit, to re-execute a letter that outlined the

representations the Manville Property Damage Settlement Trust needed Transit to make. MANV 581. Mr. Owen had previously executed a letter of representations from Mr. Mayer but had made handwritten changes to Mr. Mayer's representations. MANV 600-601. The final agreed to representations included a representation by both of the parties that "Based on claims previously submitted to Transit, the policy limits of each of the Policies have been exhausted." Both Mr. Mayer and Mr. Owen acknowledged the representations. MANV 600-601, 581, 571-572.

39. From this series of letters it is clear that all parties understood and believed the policies were exhausted.

40. Transit relied on these representations and filed the claims with the reinsurers based on the claims filed by Manville. As early as 1990, Transit was communicating this fact to Mr. Mayer and the Manville Property Damages Trust. MANV 696-697. Some time prior to 2001, Transit commuted the reinsurance on the Manville claims. MANV 496 and 498. Based on this reliance, Transit did not carry any additional reserves on the Manville account and did not have any way to recover any reinsurance on the new claims made by MSEJ. James Owen stated in his letter to the attorney's for MSEJ on May 17, 2002 "No matter how you look at it, this means that Transit's other creditors would be prejudiced by an allowance of any new

claims to MSEJ under these circumstances." MANV 418.

41. In this letter James Owen clearly outlined the case for why MSEJ's claims asserted on March 1, 2001 should be denied because of Transits reliance on the previous claims filed by Manville and for which a $24,416,466.67 allowance was made.

42. Jim Owen's letter to Ms. Gallozzi, dated May 17, 2002, was also faxed to Bill Barbagallo. In the facsimile comment section, Mr. Owen stated that if the Manville Trust still had the claim, then its attorney (Mr. Mayer) would "never make the claim because its lawyer knew that the claims were released!" MANV 431.

43. Mr. Owen in a letter to Ms. Ruskin dated January 15, 2003 reiterated the arguments as to why this claim should be denied. He clearly stated that the reinsurance commutations were entered into with the understanding that there were no further claims to be asserted. MANV 358-378.

44. The only statements from Transit which could lead the Referee to believe that initial allowance wasn't intended by the parties for final settlement of all of the claims of Manville are statements which occurred after March 1, 2001. In a facsimile sent by MSEJ, LLC purporting to memorialize a voice mail from Bill Barbagallo of Transit, "stating that the subject policies were exhausted except for claims of employees of

Johns-Manville for asbestos-related injuries." MANV 1020-1021. In his deposition, Mr. Barbagallo stated that the types of claims which had been allowed were "Asbestos, bodily Injury and property damage." (Transit's Ex. 2 Barbagallo Depo. at p. 18) He went onto characterize the claims as products limits. *Id.* It should be noted that Mr. Barbagallo did not begin his employment with Transit until December 1995. *Id.* at 11. This was after the original Notice of Determinations were sent to the Manville Property Damage Settlement Trust and after Mr. Mayer acknowledged the receipt and accepted the amounts of the allowance and forwarded his acceptance to transit. MANV 336-347,656. Because of this fact, the Referee relies on the above-referenced documents in making his recommendation.

45. The Missouri Supreme Court citing a previous decision clearly outlines the elements of estoppel, "(1) an admission, statement or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act" *Brown v. State Farm Mutual Automobile Insurance Company*, 776 S.W.2d 384 (Mo. Banc 1989) *citing Mississippi-Fox River Drainage Dist.*, 735 S.W.2d at 754.

46. Applying these elements to the facts at hand clearly demonstrate that MSEJ, LLC should be estopped from making their additional claim. Both the Property Damage Trust and MSEJ, LLC sent letters to Mr. Owen asking him to sign off on representations which included that the policies were exhausted. Relying on these statements and understandings, Mr. Owen did sign the letter of representations which then allowed MSEJ, LLC to purchase the rights to the Transit policies for cash from Mr. Mayer and the Property Damage Trust. In an effort to help the Property Damage Trust in its efforts to settle its claims with the state guarantee associations, Mr. Owen was asked to sign off on the allowance amount "dependent upon Transit being provided necessary documentation to recover said amounts from its reinsurers." MANV 696. If MSEJ, LLC is now allowed to contradict and repudiate their and or their predecessor in interest admissions and statements, then Transit's ability to efficiently manage the estate on behalf of all the creditors will be harmed causing the creditors of the same class who complied with the rules to receive less of an allowance. This is an unjust result.

II.

ADMINISTRATIVE ORDER 49 IS A VALID ORDER AND THE INFORMATION PROVIDED IS NOT SUFFICIENT TO MAKE A CLAIM

1. In making this determination and recommendation, the Referee agrees with both parties position that the 1987 Bar Date and not the March 15, 2001 date of Administrative Orde[e]r 49, is the date for which no new claims can be filed. This issue has already been decided by the Receivership Court in its decision in *Artra Group Incorporated v. Transit Casualty Company in Receivership*, Case No. CV185-1206CC Certified Question Proceeding (Cir.Ct. Cole Cty. Mo. 4/25.03). The Claimant in *Artra* was attempting to use the court's order, AO 49, as providing a new bar date. The Court rejected the Claimant's theory reiterating the 1987 date as the Court Ordered Bar Date.

2. Because of this legal decision, MSEJ, in order to be entitled to the claims they asserted on March 1, 2001, must rely on the original proof of claims filing made by Manville in 1987. They must have complied with Administrative Order 49 and the information filed on March 1, 2001 must be sufficient to support their claims.

3. Administrative Order 49 was signed by Judge Kinder on October 31, 2000. The order states:

> Pursuant to the statutes governing this Receivership, specifically including

§§ 375.650 to 375.750, 375.950 to 375.990 and 375.1150 to 375.1246, RSMo 1996, this Court must periodically review the status of the Receivership. Based upon reports from the Special Deputy Receiver, it is apparent that this Receivership is now in its final stages. In order to expedite the closure of the Receivership, this Court has determined that it is necessary that all Class III claimants, as defined in 375.700 (policyholders, state guaranty funds, third-party claimants, etc.) must present evidence of all unresolved claims, whether existing or contingent, to the Special Deputy Receiver so that he can make final determinations on such claims.

In order to effectuate this strategy all claimants, including those that have already filed policyholder protection proof of claim forms, must file the existing evidence of their current unresolved claims and any actuarial evidence (or another accepted method of valuing claims with reasonable certainty), at their present value, of future claims that may be covered by a Transit policy or other contract by 3/15/2001. After that date no new claims or evidence of claims shall be accepted or reviewed by the Special Deputy Receiver.

Notice of this order will be published in each of the following prior to January 1, 2001: *Business Insurance;*

USA Today, Mealey's Litigation Reports, the Los Angeles Times and the St. Louis Post-Dispatch.

4. Pursuant to the order it is not enough to simply file your claim but you must file evidence of all unresolved claims by March 15, 2001. The order also required either actuarial evidence or another accepted method of valuing claims with reasonable certainty.

5. However, in their March 1, 2001 filing, they stated that they were filing new claims. In making this determination a review of the letter from Quantum Consulting, Inc, written on behalf of MSEJ, LLC, to Transit dated March 1, 2001 in regards to the Additional Proof of Claim of Manville Property Damage Settlement Trust (assigned to MSEJ, LLC) is necessary. In the letter, Mr. Scognamiglio states that the prior claims against Transit were only for property damage claims and that the March 1, 2001 letter was being sent to assert new personal injury claims against Transit. MANV 508-509.

6. Further, in completing the Post Bar Date Official Form for each of the six policies, Mr. Scognamiglio reiterated his belief by stating that the previous monies paid had been for property damage only and that now MSEJ, LLC was seeking coverage under the personal injury claims only. MANV 522-539. MSEJ, LLC restates this allegation in their letter dated June 22, 2001 sent by Mr. Scognamiglio to Mr. William Barbagallo and Carol Bates both Transit Employees. In

referring to the previously allowed claim of $24,416,466.67, of which $17,071,241.62 was paid to the Receivership to Manville "This amount pertains, to property damage claims . . ." They further stated, "We write, however, to request a review of Transit's determination of the amount disallowed by the Receivership in the amount of $24,416,466.72. This sum pertains to personal injury claims and is in addition to the allowed property claims." On March 1, 2001 MSEJ did file new proof of claims asserting that an additional allowance should be made in regards to personal injury claims. MANV 508-509.

7. Since the time of these filings MSEJ, appears to have abandoned their belief in support of simply characterizing the filing on March 1, 2001 was not new proof of claims but rather was "evidence in support of unresolved claims under separate lines of coverage provided under the policies that had not been exhausted by the initial allowance in 1995." (MSEJ, LLC's Written Submission at p. 4) MSEJ, LLC stated that this information was provided in response to Administrative Order 49. MSEJ, LLC's Written Submission at p. 3.

8. This issue is also outlined by Mr. Barbagallo in his deposition when he stated that it had not been necessary for MSEJ to file the new proofs of claims on March 1, 2001. (Transit's Ex. 2 – Barbagallo Deposition at p. 29) However, the reason for the filing on March 1, 2001 was in response to Administrative

Order 49 and was an attempt by MSEJ to assert that additional coverage was available under the policies for which the initial allocation had been made. If MSEJ, LLC had stuck with their original argument, that the March 1, 2001 fling was new proof of claims they would have been barred in light of the December 1987 bar date and this court's decision in *Artra*.

9. However, MSEJ, LLC argues in their Written Submission that Administrative Order 49 is not a bar date but is being applied as such "to bar the consideration of legitimate claims." (MSEJ, LLC's Written Submissions at p. 8)

10. The Referee agrees with Transit's argument found in their Brief. Section 375.670 RSMO, requires the court to "establish claims procedures and shall limit and may extend the time for presentation of claims procedures which are not contrary to the provisions of law or supreme court rule." The purpose of Administrative Order 49 was to expedite the closure of the estate by setting a cut off date for which evidence on existing or future claims could be presented.

11. The court in *Medallion Ins. Co. v. Wartenbee*, 568 S.W. 2d 599, 601 (Mo. App 1978) *citing State ex rel. Missouri State life Ins. Co. v. Hall*, 330 Mo. 1107, 52 S.W.2d 174, 177 (banc 1932) stated that allowing the receivership court the power to establish the rules and set the procedures is not an abuse of the police

power because it protects people and the public interest.

12. MSEJ, LLC's argument that their substantive rights have been violated by the deadline has already been decided by the courts in *Angoff v. Holland America Ins. Co. Trust*, 937 S.W.2d 213 (Mo. App. 1996). The receiver for Holland-America recommended a deadline by which evidence could be filed on claims. The court determined that the receivership court could expedite closure of the estate and that this was a valid use of the police power. *Id.* at 218.

13. The Referee agrees with Transit's argument that Administrative Order 49 is determinative in this disputed claim; however, the Referee does not agree that "[a]ll of the evidence that MSEJ has put before the Receivership Court and this Referee was filed after the March 15, 2001 cut-off in Administrative Order 49." (Transit Brief at p. 21).

14. Therefore, a determination must be made as to whether the supporting documents filed with the proof of claims by Joseph F. Scognamiglio were sufficient. The information provided was a copy of the Manville Personal Injury Settlement Trust's consolidated Financial Statements for the Quarter ending September 2000. MANV 508-521. This information included data in regards to all Personal Injury Claims paid out by the Personal Injury Trust. It must be remembered that at this time, March 1,

2001, Mr. Scognamiglio was operating under the false assumption that the initial allowance had only been for property damage claims.

15. The problem with this false assumption is that it caused MSEJ, LLC to file insufficient information to make their claim. A review of the correspondence addressed between Transit and the Property Damage Settlement Trust and Manville establishes the detail of information which is required for the Receivership to make a determination before allowing for an allowance. Mr. Barbagallo reinforced this fact when he explained the type of information and evidence which should have been provided for a determination to have been made.

16. He stated that there was not any actuarial information and a modified spreadsheet talking about gross claims paid and divided over a number of years. He went on to explain the types of information that should have been made available included, "specific exhaustion information by underlying carrier in years in their entire coverage profile." (Transit Ex. 2 Barbagallo Depo. at p. 30).

17. MSEJ, LLC, by the date of the deposition, had appeared to change the basis for their claims coverage to employee work-related occupational disease, claims involving asbestosis and/or asbestos related injuries. It must also be remembered that Mr. Barbagallo allegedly directed MSEJ, LLC in this direction in a telephone message after March

1, 2001 and before the end of March 8, 2001. MANV 1020-1021 Therefore, Mr. Barbagallo also stated that for these types of claims MSEJ, LLC should also have provided "whether or not state comp was paid by Manville or any primary carrier or any carrier in their coverage profile that addressed the worker's compensation exposure. If it was not covered under state comp, but rather employer's liability coverage, Coverage B, which would include Jones Act and Longshore, did any carrier pay for these Jones Act or Longshoremen's claims. If so, how much, by whom, what years, that sort of thing . . . " (Transit Ex. 2 Barbagallo Depo. at p. 30-31).

18. If Transit acts without the proper documentation and evidence and by this lack of evidence a claim is paid which should not have been paid, the consequences are that someone is harmed – the other creditors.

19. In their Written Submission, MSEJ, LLC seems to want the Referee and this court to forget that it was MSEJ LLC's actions for which Transit was justified in relying on that established the reinsurance proceeds based on the original allowance. They argue that it was Transit's sole responsibility. (MSEJ, LLC's Written Submissions at p. 26).

20. Based on the review of the evidence, it is the Referee's determination that the information filed on March 1, 2001 was not sufficient to make a claim.

REFEREE'S RECOM[M]ENDATIONS

Pursuant to Rule 75.19(c), "the burden of proof shall be the same as the burden of proof established by the law of the State of Missouri for contested judicial claims against an insurance carrier." It is the insured, herein MSEJ, LLC, who has the burden. *See Southeast Baker Feeds, Inc. v. Ranger Ins. Co.*, 974 S.W.2d 635 (Mo. App. 1998)

MSEJ, LLC has failed to meet their burden to establish that Administrative Order 49 should not apply and to provide sufficient evidence to establish a claim and therefore the Referee's recommendation is to deny the claims filed on March 1, 2001.

Further, MSEJ, LLC should be estopped from making any further claims in that evidence demonstrates that all of the elements of estoppel as outlined by the Missouri Supreme Court have been met. "(1) an admission, statement or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act." *Brown v. State Farm Mutual Automobile Insurance Company*, 776 S.W.2d 384 (Mo. Banc 1989) *citing Mississippi-Fox River Drainage Dist.*, 735 S.W.2d at 754.

Respectfully Submitted

/s/ Joseph E. Maxwell
Joseph E. Maxwell, Referee

Minutes of May 5, 2009

[SEAL]

Supreme Court of Missouri

en banc

May 5, 2009 ►

MOTIONS FOR REHEARING

SC89663 MSEJ, LLC, Appellant, vs. Transit Casualty Company in receivership, Respondent. Appellant's motion for rehearing overruled.

MISSOURI STATUTES
TITLE XXIV BUSINESS AND
FINANCIAL INSTITUTIONS GENERALLY

375.670. Allowance of demands – receiver to review claims against receivership. –

1. The court, upon the application of the receiver, shall establish claims procedures and shall limit and may extend the time for the presentation of claims against the receivership, and notice thereof shall be given in such manner as said court shall direct; and any creditor neglecting to present his claim within the time so limited shall be debarred of all right to share in the assets of the insurer.

2. Claims presented against the receivership shall be reviewed by the receiver. The receiver shall either consent to the claim in whole or in part or shall contest the claim. If the receiver consents to the claim in whole or in part, he shall also classify the claim according to the priority to which it is entitled under section 375.700. A written notice of his consent shall be given to the claimant or his attorney by first class mail at the address shown in the proof of claim. Whenever the receiver objects to all or any portion of the claim, the claim shall be subject to the provisions of section 375.1214.

3. This section shall apply only to proceedings instituted before August 28, 1991.

(RSMo 1939 § 6060, A.L. 1988 S.B. 430,
A.L. 1992 H.B. 1574)

Prior revisions: 1929 § 5949; 1919 § 6357;
1909 § 7087

MISSOURI STATUTES
TITLE XXIV BUSINESS AND FINANCIAL
INSTITUTIONS INSURERS SUPERVISION,
REHABILITATION AND LIQUIDATION ACT

375.1208. Form of proof of claim – liquidator may request additional information – effect of incomplete information. –

1. Proof of claim shall consist of a statement signed by the claimant that includes all of the following that are applicable:

(1) The basis of the claim including the consideration given for it;

(2) The identity and amount of the security on the claim;

(3) The payments made on the debt, if any;

(4) That the sum claimed is justly owing and that there is no setoff, counterclaim or defense to the claim;

(5) Any right of priority of payment or other specific rights asserted by the claimants;

(6) A copy of the written instrument on which the claim is based; and

(7) The name and address of the claimant and the attorney who represents him, if any.

2. No claim need be considered or allowed if it does not contain all the information in subsection 1 of this section which may be applicable. The liquidator may require that a prescribed form be used, and may require that other information and documents be included. The court before which the liquidation proceedings are pending may establish by court order or local court rule additional claims procedures which are not contrary to the provisions of law or supreme court rule.

3. At any time the liquidator may request the claimant to present information or evidence supplementary to that required under subsection 1 of this section and may take testimony under oath, require production of affidavits or depositions, or otherwise obtain additional information or evidence.

4. No judgment or order against an insured or the insurer entered after the date of filing of a successful petition for liquidation, and no judgment or order against an insured or the insurer entered at any time by default or by collusion need be considered as evidence of liability or of the amount of damages. No judgment or order against an insured or the insurer entered within four months before the filing of the petition need be considered as evidence of liability or of the amount of damages.

5. All claims of a guaranty association or foreign guaranty association shall be in such form

and contain such substantiation as may be agreed to by the association and the liquidator.

(L. 1991 H.B. 385, et al. § 85)

MISSOURI STATUTES
TITLE XXIV BUSINESS AND FINANCIAL INSTITUTIONS INSURERS SUPERVISION, REHABILITATION AND LIQUIDATION ACT

375.1214. Denial of claim – appeal procedure. –

1. When a claim is denied in whole or in part by the liquidator, written notice of the determination shall be given to the claimant or his attorney by first class mail at the address shown in the proof of claim. Within sixty days from the mailing of the notice, the claimant may file his objections with the liquidator. If no such filing is made the claimant may not further object to the determination.

2. Whenever objections are filed with the liquidator and the liquidator does not alter his denial of the claim as a result of the objections, the liquidator shall ask the court for a hearing as soon as practicable and give notice of the hearing by first class mail to the claimant or his attorney and to any other persons directly affected, not less than ten nor more than thirty days before the date of the hearing. The matter may be heard by the court or by a court-appointed referee. Hearings before court-appointed referees shall be conducted in an informal manner and the formal rules of evidence shall not apply. The

referee shall submit written findings of fact and conclusions of law along with his recommendation for disposition which shall become final if a motion for reconsideration before the court is not filed by the liquidator or claimant with the court within fifteen days that notice of such findings and conclusions is mailed to the parties. The motion for reconsideration shall allege either the existence of new facts which could not, with reasonable diligence, have been discovered and presented before the referee, or such erroneous conclusions of law, that would justify reconsideration of the claim by the court. A motion for reconsideration based upon erroneous conclusions of law may be decided by the court, after opportunity for response by the prevailing party, without necessity of hearing. A motion for reconsideration not ruled upon by the court within ninety days after the motion is filed shall be deemed denied for purposes of appeal.

(L. 1991 H.B. 385, et al. § 88)